Update on costs awards in Cayman Islands shareholder appraisals

Insights - 19/05/2023

As we previously reported in our briefing FGL Holdings – Cayman Court determines fair value at transaction price, in September 2022 the Grand Court of the Cayman Islands delivered final judgment in *FGL Holdings*[1], an appraisal action arising out of a section 238 dissent to a Cayman merger.[2]

Parker J ruled that the fair value of the dissenting shareholders' former shares was the same as the merger price that had originally been offered to them.

Parker J has now handed down a further judgment dealing with the costs of these proceedings.[3] The judgment holds the dissenters jointly and severally liable for FGL's costs on the standard basis. However, for reasons we explain further below, the judgment does contain some good news for the dissenting shareholders that will also be encouraging for other section 238 dissenters.

Costs in section 238 cases

Section 238(14) of the Companies Act provides that the costs of section 238 proceedings may be determined by the court and taxed upon the parties "as the Court deems equitable in the circumstances". The discretion is a wide one, with a focus on doing what is just.

If dissenting shareholders participate actively in the trial (as they did in *FGL Holdings* and have done so in every other section 238 trial to date) then it is well established that O.62, r.4 of the Grand Court Rules applies,[4] meaning that the "*successful party*" should recover from the opposing party the reasonable costs they have incurred in conducting the proceedings in an economical, expeditious and proper manner (unless otherwise ordered by the court).

In the judgment Parker J laid out how these principles have been applied in previous section 238 cases which have gone to trial. Briefly:

- *Integra*[5] : the dissenter was held to have been the successful party because the court preferred the approach of the dissenter's valuation expert and fair value was found to be 17%

more than the merger price. The dissenter was therefore awarded its costs

- *Qunar*[6] : fair value was held to be slightly more than the merger price, but no order was made as to costs. Although the dissenters had technically "beaten" the merger price by 2.6%, the court found that the company was the successful party because most of the company's valuation evidence had been accepted
- *Trina Solar*[7] : the dissenters were found to have been the successful party even though they only got a 1.29% uplift from the merger price. [8] However, since the dissenters' and the company's valuation experts each had evidence rejected on significant issues, the court considered an issues-based approach to be appropriate and made no order as to costs

Costs award in *FGL Holdings*

Parker J confirmed that "success" in each section 238 case is fact specific. It is not simply a question of "who writes the cheque" at the end of the trial but depends on factors such as

- the arguments advanced by the parties
- their conduct in the lead up to and at trial
- the opinions provided by the valuation experts
- the fair value determination
- any prior offers made by the company

While the previous cases may be illustrative, each case is highly fact dependent.

At trial, Parker J had accepted the primary valuation method of FGL's valuation expert, while finding that the dissenters' expert's methodology provided neither a balanced view nor a central estimate. The dissenters had also accepted an interim payment from FGL before trial equivalent to the merger price, with an agreed condition that they would not have to repay any of it should fair value be determined at less than the merger price. Upon doing so, the dissenters then continued the litigation to try to beat that price and failed to do so.

Taking all these factors into account, Parker J ultimately decided that FGL was the successful party and ordered the dissenters to pay FGL's costs (including the costs of its data hosting platform and contract reviewers outside the Cayman Islands) on the standard basis.

Furthermore, Parker J ordered that these costs be payable on a joint and several basis (rather than the more standard pro-rata basis according to the number of shares held by each dissenter). Parker J considered that the dissenters had dealt with the litigation as a group making common cause, and that FGL should not be exposed to the risk of having to pursue multiple entities for pro-rata slices of the costs award rendered against the dissenters as a whole.

FGL's unsuccessful indemnity costs application

The dissenters did however still enjoy some success, in that Parker J refused FGL's application for the dissenters to pay its costs of providing discovery on the indemnity basis.

FGL argued that the dissenters behaved unreasonably in pushing it to conduct a massive and expensive discovery exercise, in circumstances where only a very small number of the documents provided were later referred to by either valuation expert in their reports. In rejecting the application Parker J decided that the dissenters had not acted unreasonably, and it would not be fair or just in all the circumstances to penalise the dissenters with hindsight based on what documents the expert reports expressly referred to.

Comment

The court's decision to award costs against the dissenters will no doubt have been disappointing for them but is consistent with the approach that the Grand Court of the Cayman Islands has taken in past section 238 cases.

The court's refusal to penalise the dissenters with indemnity costs in respect of the company's discovery will however have been welcomed and is encouraging for current and future dissenting shareholders. In particular, this ruling allows dissenters to continue to hold companies to account with regard to their discovery obligations without fear of later penalty based upon what documents the independent valuation experts may ultimately choose to rely on.

Ogier is a leading shareholder appraisal firm in the Cayman Islands. For more information, contact one of the authors of this article.

[1] FSD 184 of 2020, Unreported Judgment, 20 September 2022 (Parker J)

[2] See section 238 of the Cayman Companies Act (2022 Revision).

[3] *In the matter of FGL Holdings*, FSD 184 of 2020, Unreported Judgment, 19 April 2023 (Parker J)

[4] *In the matter of Qunar Cayman Islands Limited,* FSD 76 OF 2017, Unreported Judgment, 29 March 2021 (Parker J)

[5] *In the matter of Integra Group* [2016 (1) CILR 192]

[6] *In the matter of Qunar Cayman Islands Limited,* FSD 76 OF 2017, Unreported Judgment, 29 March 2021 (Parker J)

[7] *In the matter of Trina Solar Limited*, FSD 92 of 2017, Unreported Judgment, 23 September 2020 (Segal J)

[8] The fair value amount ordered has since been overturned on appeal (in a decision which was released after the *FGL Holdings* judgment) but the costs principle in *Trina Solar* remains relevant.

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